IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

COMPANY PETITION No 84 of 2001
with
COMPANY PETITION No 85 of 2001

For Approval and Signature:

Hon'ble MR.JUSTICE C.K.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

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ANMOL DAIRY LTD.

Versus

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Appearance:

1. COMPANY PETITION No. 84 of 2001
MRS SWATI SOPARKAR for Petitioner No. 1
MR DN PATEL Ld. SENIOR CENTRAL GOVT. COUNSEL &
MRS PJ DAVAWALA Ld. ADDL> STANDING CENTRAL GOVT. COUNSEL for Union of India

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CORAM : MR.JUSTICE C.K.BUCH

Date of decision: 07/08/2001

ORAL JUDGEMENT

Heard the learned counsel Mrs. Soparkar for the

petitioner companies, the Official Liquidator who is present in the Court, Mr DN Patel learned Senior Central Government Standing Counsel and Mrs. PJ Davawala learned Addl. Central Govt. Standing Counsel. Mrs. PJ Davawala has tendered a letter dated 23.7.2001 received by her from the office of Registrar of Companies, Gujarat wherein it is stated that the scheme for amalgamation was sent for examination to the Central Government and the Government has decided that the matter be left to the decision of the Court on merits. The said letter is taken on record.

The report of the OL based on the report of the Chartered Accountant of transferor company, is self explanatory. It is submitted that on scrutiny and investigation of the books of accounts and affairs of the companies are in accordance with the norms. The report of the Chartered Accountant says that scrutiny of the record and books of account produced before them, in their opinion the affairs of the companies have not been conducted in the manner prejudicial to its members and in the interest of public at large. So, the opinion in these two reports cannot be said to be negative opinion, on the contrary, it can be construed as positive opinions.

These are the petitions filed by two companies namely, Anmol Dairy Limited and Dairy Den Limited for sanctioning a scheme of amalgamation of Anmol Dairy Limited with Dairy Den Limited along with the compromise with the creditors of Anmol Dairy Limited under Section 391 read with Section 394 of the Companies Act, 1956.

Anmol Dairy Limited, the transferor company was engaged in the business of manufacturing and processing of milk and milk products. The company could not function profitably for a long time and BIFR had declared it a sick company on 9.6.1998. The efforts were made to revive the company but ultimately BIFR formed an opinion to wind up the company. Dairy Den Limited, the transferee company is engaged in the business of manufacturing, marketing and trading of ice cream making machines. It has also started making soft serve through its subsidiary. It is a profit making company. The scheme is proposed to amalgamate the Transferor Company with the Transferee Company and provide a better alternative to the creditors of Anmol Dairy Limited to realise their dues. The petitions give more details of the advantages that would flow by virtue of the amalgamation of these companies. The secured creditors suggested some modifications in the terms of compromise

of the scheme. The same were accepted by the petitioner companies. The modified scheme of amalgamation and compromise was unanimously approved by the Secured Creditors. The modified Scheme of Amalgamation and compromise has also been unanimously approved in the meetings of the Equity Shareholders of both the petitioner companies and in the meeting of the Unsecured Creditors of the Transferor Company. The relevant reports from the Chairman of the meetings are on record.

Under the modified scheme, further negotiations were permitted between the petitioner companies and IDBI, the major secured creditor. The same were conducted after the meetings and the terms have been further modified by mutual consent. The additional affidavits dated 30th July and 31st July 2001 are filed by the respective Directors of both the petitioner companies. A xerox copy of the letter from IDBI, the major secured creditor, dated 18.6.2001, indicating the acceptance of the modified terms is also placed on record. The scheme, incorporating these final modifications is also put on record.

After the petitions were admitted they were advertised in the news papers. No one has come up with any objections after the publication. Notice of the petitions have been served upon the Central Government and Shri DN Patel, Senior Central Govt. Standing Counsel and Mrs. PJ Davawala Addl. Central Govt. Counsel appear for the Central Government. As referred earlier the Court is informed and the letter from the Registrar of Companies of Gujarat dated 23.7.2001 is placed on record indicating that the Central Government does not propose to object to the scheme of amalgamation and compromise.

During the course of hearing and even after perusal of additional affidavit filed and tendered today and the letter of IDBI, the OL has pointed out that this Court should examine the issue of jurisdiction whether such amalgamation can be accepted and approved by the Court when the transferor company was before the BIFR and BIFR has recommended winding up of the transferor company. In short, the say of OL is that the report of BIFR being an opinion of Expert Body, whether should be accepted or not is the crucial question and if it is answered in affirmative, than normally such amalgamation should not be permitted.

I have considered the entire scheme and the

exercise which are undertaken by the BIFR under the provisions of the Sick Industrial Companies (Special Provisions) Act, 1985 and the relevant provisions of the Companies Act. Before the formal order of winding up could passed qua transferor company namely Anmol Dairy Ltd., this Court is competent to examine whether the company proposed to be wound up according to the opinion of the BIFR whether can live further on its amalgamation with other steady or healthy going company. For the very purpose, the meeting of respective creditors and shareholders were called and all concerned have approved the scheme especially the main two secured creditors. If this eventuality would have happened earlier when the proceedings were pending before the BIFR, the BIFR might have approved the very scheme. After rendering opinion, the proceedings before the BIFR can be said to have been concluded. The opinion of the BIFR which has come to the Court is afterall an opinion of expert body. In more than one case, it has been held that the opinion of BIFR should be given due weightage, but it is not binding to the High Court and High Court can go into the correctness of the opinion so submitted by the BIFR. High Court can independently decide as to whether it should proceed and cause to proceed with the winding up of sick industrial company, in accordance with the provisions of the Companies Act. Here, the transferor company has completely arranged the amalgamation scheme duly approved and this Court should not have any hesitation in accepting the scheme. When the Madras High Court was dealing with the constitutional validity of sub-section (2) of Section 20 of the Sick Industrial Companies (Special Provisions) Act, 1985 it has observed that recommendation of BIFR to wind up the company is a recommendation of BIFR which is an expert body. The provisions cannot be said to be arbitrary, however, the report of BIFR is not binding to the High Court though normally High Court will be giving due weightage to such recommendation. Reasons for findings are approved by Supreme Court when this judgment was carried in appeal (89 Company Cases (1997) p. 609). This Court before it could consider the Board opinion on merits qua the winding up recommended for transferor company, the Scheme of amalgamation was proposed by both the companies and as it was found workable even by the secured creditors, they have not resisted the scheme before the court, on the contrary the documents available on record says that they are satisfied with the scheme proposed. So, it would be legal to accept as transferor company is before this court under winding up proceedings initiated under the recommendation of BIFR, this court should not approve any scheme of amalgamation or merger and such matter should

be sent back to BIFR for consideration denovo as to its viability and/or also for the purpose of change of its opinion. If this scheme would not have been accepted by shareholders and creditors or would have failed otherwise only than question of consideration of Board opinion would arise. On merits, if this Court is of the view that the opinion of BIFR is not correct, the Court on reason may not accept the recommendation for winding up. High Court while accepting Scheme of Amalgamation or other arrangement may consider the opinion of BIFR and reasons for the opinion expressed but that would be under a rule of prudence. Every thing rests with the facts and circumstances of each case. I would like to quote relevant observation of the decision of Madras High Court reported in 89 Company Cases p. 600

"Therefore, it appears to us that even though the opinion submitted by the Board forms the basis for ordering winding up of the sick industrial company by the High Court, it is nevertheless open to the High Court to go into the correctness of the opinion so submitted by the Board and decide as to whether it should proceed and cause to proceed with the winding up of the sick industrial company, in accordance with the provisions of the Companies Act. This is clear by the use of the words, "and may proceed and cause to proceed" in sub-section (2) of section 20 of the Act. Therefore, it is not possible to hold that even though the opinion submitted by the Board forms the basis for directing the winding up of the sick industrial company by the High Court, the High Court is precluded from examining the correctness of such opinion. Therefore, it cannot be held that it is obligatory on the High Court to order winding up of the sick industrial company once it receives an opinion from the Board in this regard without examining the correctness of such opinion, on hearing the concerned parties. However, normally, such opinion being one tendered by the Board consisting of experts acting judicially will have a greater weight in deciding the question as to proceeding with the winding up of the sick industrial company. Such opinion of the Board cannot lightly be brushed aside."

It is not a matter of dispute that report under sec. 20 of the Sick Industrial Companies (Special

Provisions) Act, 1985 is to be submitted as a last resort but before winding up order could be passed on the strength of recommendation by BIFR, this Court is competent to approve and accept the scheme of amalgamation or merger of the very company for which the recommendation of winding up is made by BIFR. Question of lack of jurisdiction would not arise and there is no express or implied bar. Provisions of sec. 391 of the Companies Act are very relevant for the purpose. The words of this section are very wide. They apply in terms to a company in winding up also. An arrangement under this section can therefore also take a company out of winding up. The ratio of the decision in case of Vasant Investment Corporation Ltd., Re, (1982) 52 Company Cases p. 139 (Bombay) can be considered. The pendency of winding up petition or even passing of winding up order does not prevent the court from considering the prayer for approval of a scheme for rescuing the company which is under the hot water. In case of Vasant Investment (supra) it has been held that:

"there was no other provision under the Companies Act, 1956, apart from s. 391 under which a proposal for taking a company out of the winding-up could be framed. The words used in s. 391 were very wide and they covered all arrangements which might bemade between a company and its members, including an arrangement for re-starting the company which was under winding-up.

It is a company which is being wound up that can be taken out of the winding-up. Section 391, in terms, applies to a company which is being wound up, and the section provides that in the case of a company which is being wound up, an application under s. 391 can be made by a liquidator also, in addition to a creditor or a member of the company. Therefore, s. 391 would apply to a company which is being wound up and an arrangement under s. 391 would cover an arrangement to take such a company out of the winding-up."

So, existence of the Board opinion against one of the company i.e. transferor company would not come in the way of transferor company, nor the company court. I have considered the opinion of BIFR from the file tagged with amalgamation petitions.

I am satisfied that the amalgamation and the compromise would be in the interest of the companies, their members and the creditors of Anmol Dairy Limited. Under the circumstances the Final Scheme of Amalgamation (Annexure-C-2 to the Company Petition No. 85 and Annexure-D/"C-2" to the Company Petition No. 84) is sanctioned. In Company Petition No. 84 of 2001 prayers in terms of para-21(A) of the petition are granted. In Company Petition No. 85 of 2001 prayers in terms of para-20(A) of the petition are granted.

The petitions are disposed of accordingly. So far as the costs to be paid to the Central Government Standing Counsels are concerned, I quantify the same at Rs. 2500/ per petition. The same may be paid to Shri DN Patel for one petition and to Mrs. PJ Davawala for the other.

(C.K. BUCH, J.)
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